

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Aetna Life Insurance Company

Plaintiff

V.

Methodist Hospitals of Dallas, *et al.*

Defendants

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No. 4:13-cv-3412

**PLAINTIFF AETNA LIFE INSURANCE COMPANY'S RESPONSE TO
MEDICAL CENTER ENT'S MOTION TO DISMISS [Dkt#12]**

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Defendants' counsel have a routine: shortly before demanding large sums of improper prompt-pay penalties from Aetna and commencing litigation, they send a letter to Aetna requesting their client's provider contract. They did so here for Defendant Medical Center Ear, Nose & Throat Associates of Houston, P.A. ("Medical Center ENT"). Aetna thus reasonably believed that litigation with Medical Center ENT was imminent.

Now, however, Medical Center ENT has broken the routine after requesting the aforementioned contract. Medical Center ENT asserts that there is no justiciable controversy here because it has never made a "formal claim" against Aetna for statutory prompt pay penalties, and, in an affidavit executed by its "Administrator,"

specifically disavows any claims, past and future, against Aetna Health, Inc., or any of its affiliates, with respect to potential liabilities of Aetna and its affiliates arising from the TPPA [*i.e.*, the Texas Prompt Pay Act] for Medical Center ENT claims arising in the past up to and including the date on which this affidavit is signed [*i.e.*, December 9, 2013].¹

If a covenant is "unconditional and irrevocable," and sufficiently broad to encompass all of the conduct in dispute, it can moot a controversy. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 728–29 (2013). Medical Center ENT's covenant does not pass this test. It does not, for example, preclude Medical Center ENT from revoking its "disavowal" tomorrow. If, however, the Court conditions dismissal on Medical Center

¹ Dkt#12-1 at ¶ 9.

ENT making its disavowal unconditional and irrevocable, Aetna has no objection to Medical Center ENT's dismissal.²

Respectfully submitted,

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² Any subsequent dismissal of ENT has no impact on the venue questions raised by the defendants. "[T]he relevant inquiry is whether jurisdiction and venue existed at the time this action was filed." *Adaptix, Inc. v. HTC Corp.*, 937 F. Supp. 2d 867, 872 (E.D. Tex. 2013) (citing *Hoffman v. Blaski*, 363 U.S. 335, 344, 80 S. Ct. 1084, 1090 (1960)). Here, venue was proper and it remains so. *See generally* Plaintiff Aetna Life Insurance Company's Response to Defendants' Motions to Dismiss Under Rule 12(b)(3) and Alternatively to Transfer Venue.

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the following attorneys of record who area known “Filing Users”:

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